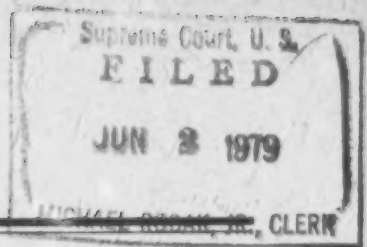


No. 78-599



**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

PRIVATE FRANK L. HUFF, ET AL.

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR THE PETITIONERS

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 575 F.2d 907. The opinion of the district court (Pet. App. 33a-50a) is reported at 413 F. Supp. 863.

**JURISDICTION**

The judgment of the court of appeals (Pet. App. 51a-52a) was entered on March 15, 1978. A petition for rehearing was denied on May 15, 1978 (Pet. App. 53a). On August 7, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to September 12, 1978. On September 1, 1978, Mr. Justice Brennan further extended the time to October 12, 1978. The petition was filed on October

10, 1978, and was granted on March 19, 1979 (A. 58). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether Navy and Marine Corps regulations that require military personnel located at a foreign duty station to obtain approval before circulating petitions to members of Congress on military bases are invalid under 10 U.S.C. 1034.

#### CONSTITUTIONAL PROVISION, STATUTE, AND REGULATIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

Congress shall make no law \*\*\* abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 10 U.S.C. 1034 provides:

No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

3. Department of Defense Directive 1325.6 (1969) provides in relevant part:

#### 1. PURPOSE AND APPLICABILITY

This Directive provides general guidance governing the handling of dissident activities by members on active duty of the

Army, Navy, Air Force, and Marine Corps. Specific problems can, of course, be resolved only on the basis of the particular facts of the situation and in accordance with the provisions of applicable Department regulations and the Uniform Code of Military Justice.

#### II. POLICY

It is the mission of the Department of Defense to safeguard the security of the United States. The service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security. On the other hand, no Commander should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of his unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible Commander.

#### III. SPECIFIC GUIDELINES

The following Guidelines relate to principal activities in this area which the Armed Forces have encountered:

##### A. Possession and Distribution of Printed Materials

1. A Commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post

exchange and military libraries. In the case of distribution of publications through other than official outlets, a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission. When he makes such a determination, the distribution will be prohibited.

2. While the mere possession of unauthorized printed material may not be prohibited, printed material which is prohibited from distribution shall be impounded if the Commander determines that an attempt will be made to distribute.

3. The fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited.

4. Fleet Marine Force Pacific Order (FMFO) 5370.3 (1974) provides in relevant part:<sup>1</sup>

<sup>1</sup>Four Navy and Marine Corps regulations are at issue in this case. Each regulation has the same operative language as the one quoted in the text; they differ only on the geographic area where they apply. See Pet. App. 7a. The challenged regulations are

a. Section 3(b)

No Fleet Marine Force, Pacific or Marine Corps Bases, Pacific, personnel will originate, sign, distribute, or promulgate petitions, publications, including pamphlets, newspapers, magazines, handbills, flyers, or other printed or written material, on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, on any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained.

b. Section 4(a):

Commanding generals and commanding officers will control or prohibit the unauthorized activities described in subparagraphs 3a, 3b, and 3c above if, in their judgment, the activity would:

(1) Materially interfere with the safety, operation, command, or control of his unit or the assigned duties of particular members of the command; or

(2) Present a clear danger to the loyalty, discipline, morale, or safety to personnel of his command; or

(3) Involve distribution of material or the rendering of advice or counsel that causes,

paralleled by regulations adopted by the Army and Air Force. See *Schneider v. Laird*, 453 F. 2d 345 (10th Cir.), cert. denied, 407 U.S. 914 (1972). The Air Force regulations are the subject of *Brown v. Glines*, No. 78-1006, which is to be argued in tandem with this case.

attempts to cause, or advocates insubordination, disloyalty, mutiny, refusal of duty, solicits desertion, discloses classified information, or contains obscene or pornographic matter; or

(4) Involve the planning or perpetration of an unlawful act or acts.

c. Section 4(c):

Instances in which a commander has prohibited activities or actions of Fleet Marine Force, Pacific or Marine Corps Base, Pacific, personnel pursuant to subparagraphs 3a, 3b, and 3c above shall be immediately reported, with amplifying details, by message to his headquarters.

#### STATEMENT

1. Each of the military departments has adopted regulations that require servicemen who wish to distribute petitions or other written materials on a military base to obtain the prior approval of their commanding officer. See, e.g., FMFO 5370.3 (Navy); AFR 30-1(9) (Air Force).<sup>2</sup> These regulations are authorized by Department of Defense (DOD) Directive 1325.6 (1969). The Directive provides that "a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a clear danger to the loyalty, discipline, or morale of military

<sup>2</sup>The Army regulations are discussed in *Schneider v. Laird*, *supra*. See also *Dash v. Commanding General*, 307 F. Supp. 849 (D. S.C. 1969), *aff'd*, 429 F. 2d 427 (4th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971).

personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission." DOD Dir. 1325.6 para. III(A)(1). The policy of the Directive is to preserve the "service member's right of expression \*\*\* to the maximum extent possible, consistent with good order and discipline and the national security." *Id.* at para. II. Thus, the Directive counsels that the "fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited." *Id.* at para. III(A)(3).

Pursuant to this Directive, Navy and Marine Corps regulations provide that no servicemen shall "distribute or promulgate petitions, publications \*\*\* handbills, flyers, or other printed or written material, on board any ship, craft, aircraft, or \*\*\* on any military installation on duty or in uniform, \*\*\* unless prior command approval is obtained." FMFO 5370.3 §3(b). The regulations further provide that the commanding officer is to deny approval if the material proposed for distribution would (1) materially interfere with the safety or duties of the command, (2) "[p]resent a clear danger to the loyalty, discipline, morale, or safety" of the personnel in his command, (3) cause or advocate insubordination, disloyalty, desertion, or contain obscene matter, or (4) involve the planning of an unlawful act. *Id.* at §4(a).

2. During 1974 respondents, three Marine Corps Servicemen stationed at the United States Marine Corps Air Station at Iwakuni, Japan, sought prior approval from their base commander to distribute copies of petitions to members of Congress. One

petition objected to the use of military personnel in labor disputes; a second supported amnesty for those who resisted conscription or deserted the armed forces during the Vietnam war (Pet. App. 39a). The base commander denied permission to circulate these two petitions on the base (Pet. App. 3a; A. 34-35, 46-47).<sup>3</sup> Respondents Huff and Falatine distributed, without seeking permission, copies of a third petition objecting to United States support for the government of South Korea (Pet. App. 40a). They were arrested, and Huff was convicted after a court-martial of violating the prior approval requirement (*ibid.*). After the arrests respondent Gabrielson sought permission to distribute the South Korea petition on and off the base; the base commander granted permission for on-base circulation, provided that the circulation was non-argumentative and did not take place in the barracks (*id.* at 40a-41a; A. 56-57).

3. Respondents then filed this action in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief against further enforcement of the military regulations. They alleged that the regulations are an unconstitutional restraint on First Amendment expression and are invalid under 10 U.S.C. 1034, which prohibits any person from

<sup>3</sup>Following this denial, respondents Huff and Falatine requested permission to circulate copies of a leaflet containing the Declaration of Independence and the First Amendment to the Constitution, along with their interpretation of these documents (Pet. App. 39a). The base commander denied permission to circulate this leaflet (*id.* at 39a-40a). During the course of this litigation petitioners conceded that the base commander lacked proper basis under the regulations to refuse to allow distribution of these materials (*id.* at 3a).

"restrict[ing] any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States" (A. 5-13). Respondents sought, and obtained, certification of the case as a class action "on behalf of all members of the Marine Corps stationed at, assigned to, or on duty at the Marine Corps Air Station at Iwakuni, Japan \* \* \*" (Order of July 17, 1975, at 4).

The district court granted respondents' motion for summary judgment. The court held that "the very system of prior restraints for serviceman-to-serviceman distribution of materials on-base during off-hours and away from restricted or work areas, is unconstitutionally restrictive of First Amendment freedoms" (Pet. App. 45a). The court also concluded that the base commander's decision to prohibit or restrict distribution of the three specific petitions to members of Congress was not grounded in a sufficient showing of military necessity and was therefore invalid under 10 U.S.C. 1034 (*id.* at 44a).<sup>4</sup> Accordingly, the court entered an injunction prohibiting the military officials from applying the challenged regulations to require prior approval for the "distribution of printed materials during off-hours and away from restricted or work areas on-base at the Marine Corps Air Station, Iwakuni, Japan" (*id.* at 57a).

<sup>4</sup>The district court upheld application of the prior approval requirement to off-base petitioning in foreign countries (Pet. App. 48a-50a). Accordingly, it did not disturb the sanctions imposed for the off-base distribution of the South Korea petition (*id.* at 50a).

4. The court of appeals held that the focal point of the litigation is on petitions to members of Congress and that the validity of the regulations with respect to other types of written materials could not properly be decided on the record in this case (*id.* at 5a-7a). The court therefore rejected the broad holding of the district court that the prior approval requirement of the regulations is invalid as applied to all written materials distributed on base (*id.* at 5a-7a, 21a).

The court of appeals found it unnecessary to decide whether the regulations' requirement that servicemen submit petitions to members of Congress to military authorities for approval prior to distribution is an unconstitutional "prior restraint" on expression.<sup>5</sup> The court concluded instead that application of the prior approval requirement to such petitions is invalid under 10 U.S.C. 1034, which prohibits regulatory restrictions that are not "necessary to the security of the United States." Although the court recognized that the prior approval requirement contributes to "order and discipline" at the "combat ready" Iwakuni Air Station,<sup>6</sup> the court concluded that avoiding "lapses of military discipline" is not "necessary to the national security"

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<sup>5</sup>The court noted, however, that under *Parker v. Levy*, 417 U.S. 733 (1974), "the presumption against prior restraints would not be as great [in the military context] as it is in the civilian context; and we would be required to undertake a careful balancing of competing first amendment interests and military requirements" (Pet. App. 9a).

<sup>6</sup>During 1972 and 1975 units were deployed directly from Iwakuni Air Station to combat and relief operations in Vietnam. Similar deployments to Thailand and Cambodia also occurred during these years (Pet. App. 28a-29a).

(Pet. App. 16a). Moreover, the court suggested that the military interest in preventing on-base distribution of "petitions which prove to be improper in their content" (*id.* at 17a) may be adequately protected by sanctions imposed after distribution has occurred. The court thus affirmed the injunction to the extent that it forbids application of the prior approval requirement to the distribution of servicemen's petitions to members of Congress.

Judge Tamm filed a separate opinion arguing that the judgment of the district court should be reversed in its entirety (*id.* at 22a-32a). Reviewing the legislative history of 10 U.S.C. 1034, Judge Tamm determined that the statute is intended to proscribe only interference with a serviceman's personal, private communication to members of Congress. Application of the prior approval requirement to the on-base distribution of petitions, however, affects only collective petitioning activity. Accordingly, Judge Tamm concluded, 10 U.S.C. 1034 does not apply to the regulations challenged in this case (Pet. App. 26a). Judge Tamm also argued that even if Congress intended 10 U.S.C. 1034 to apply to both individual and collective petitioning activity, the prior approval requirement is valid because the maintenance of order, discipline, loyalty, and morale at a combat-ready military facility is necessary to the security of the United States within the meaning of that statute (Pet. App. 26a-31a).

**ARGUMENT**

For the reasons stated at pages 36-48 of our brief in *Brown v. Glines*, No. 78-1006,<sup>7</sup> the court of appeals erred in concluding that the prior approval requirement of the challenged regulations is invalid under 10 U.S.C. 1034.

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.  
*Solicitor General*

JUNE 1979

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<sup>7</sup>We are sending respondents a copy of our brief in *Brown v. Glines*.